

Schedule 28
Design Certifiers Appointment



dated

201[•]

The Mayor and Burgesses of the London Borough of Barnet

and

Countryside Properties (UK) Limited

and

[Design Certifier]

Appointment of Design Certifier

relating to the regeneration of Dollis Valley

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Contents	Page
1 Definitions and interpretation	1
2 Appointment	2
3 Services	3
4 Fee	5
5 Termination	5
6 Consequences of termination	6
7 Confidentiality	7
8 Copyright	7
9 Professional Indemnity Insurance	8
10 Notices	9
11 Assignment	9
12 Enforcement	9
13 Waiver	9
14 Severability	10
15 Counterparts	10
16 Variation	10
17 Adjudication	10
18 Governing Law and Jurisdiction	12
19 Third Party Rights	12
20 No partnership	12
21 Whole agreement	12
22 Severability	12
23 Force majeure	12
24 Limitation on liability	12
Schedule 1 - Scope of Services	14
Schedule 2 - Schedule of Fees	15

Deed of Appointment

dated 201[•]

Parties

- (1) **The Mayor And Burgesses Of The London Borough Of Barnet** of North London Business Park, Oakleigh Road South, London, N11 1NP (the **Council**);
- (2) **Countryside Properties (UK) Limited** (company number 00614864) having its registered office at Countryside House, The Drive, Brentwood, Essex CM13 3AT (the **Partner**); and
- (3) [] of [] (the **Design Certifier**).

Background

- (A) The Council and the Partner have entered into an agreement dated on or about the date of this Deed (as amended, varied or replaced from time to time) (the **Regeneration Agreement**) for the redevelopment of Dollis Valley.
- (B) The Design Certifier is willing to provide services to the Council and the Partner as an independent adviser.
- (C) The Council and the Partner have jointly agreed to engage the Design Certifier to carry out the duties and obligations ascribed to the Design Certifier in the Regeneration Agreement under the terms of this Deed.
- (D) The Design Certifier has agreed to accept such appointment on the terms set out in this Deed.

Operative clauses

1 Definitions and interpretation

1.1 In this Deed, unless the context otherwise requires:

Services means the services to be performed by the Design Certifier as set out in schedule 1 as may be varied in accordance with the terms of this Deed.

1.2 Subject to clause 1.1 and unless the context otherwise requires or this Deed specifically provides otherwise, defined terms shall bear the same meanings ascribed to them in the Regeneration Agreement.

1.3 In interpreting this Deed:

1.3.1 references to the singular shall be deemed to include the plural (and vice versa) references to the masculine gender include the feminine and neuter genders and reference to a person shall be deemed to include any individual firm unincorporated association or body corporate,

1.3.2 references in this Deed to a clause or schedule are to a clause or schedule of this Deed except where expressly provided to the contrary,

1.3.3 any reference to any enactment includes any consolidation, re-enactment, amendment or replacement of it and any subordinate legislation under it,

1.3.4 headings to clauses are for the reference of the parties and do not affect their interpretation.

2 Appointment

2.1 The Council and the Partner jointly appoint the Design Certifier to perform the obligations and tasks which are ascribed to the Design Certifier under the Regeneration Agreement and to provide the Services upon the following terms until the earlier of:

2.1.1 the date of certification of the final Regeneration Phase; and

2.1.2 any termination of the Design Certifier's appointment in accordance with clause 7.

2.2 All approvals, instructions, consents and directions to be given, and all requests, decisions and arrangements to be made by the Council and/or the Partner under this Deed shall be given or made in writing, signed by either the Council or the Partner (and the Council and the Partner shall provide the other (as the case may be) with a copy of the same) save in relation to:

2.2.1 any termination of the Design Certifier's appointment under this Deed; or

2.2.2 any variation to the terms of this Deed,

whereupon in each such case the signature of both the Council and the Partner shall be required.

2.3 The Council and/or the Partner have provided the Design Certifier with (and the Design Certifier acknowledges receipt of) a true copy of the Regeneration Agreement and the Design Certifier is deemed to be aware of their content in so far as the same relate to the provision of the Services.

2.4 The Partner shall provide to the Design Certifier without delay:

2.4.1 true copies of the finalised Master Plan and Master Programme following agreement of the same by the Council and the Partner pursuant to clause 3.6 of the Regeneration Agreement; and

2.4.2 a true copy of the Design Guidelines following agreement of the same by the Council and the Partner pursuant to clause 10.16 of the Regeneration Agreement.

2.5 The Design Certifier acknowledges that any breach by it of this Deed may result in the Council and/or the Partner becoming liable in damages or incurring losses, liabilities, costs, expenses and charges (whether in connection with claims or proceedings or otherwise) under the Regeneration Agreement and all damages, losses, liabilities, costs, expenses and charges (however so arising) are agreed to be within the contemplation of the parties as probable results of any such breach, act or omission or non performance by the Design Certifier. The Design Certifier will be liable to the Council and the Partner for all damages, losses, liabilities, costs, expenses and charges whatsoever arising as a consequence of any failure on the part of the Design Certifier to properly undertake and perform his duties and obligations under this Deed.

2.6 Subject to Clause 2.7, the Design Certifier shall use the following partners, directors or employees: *[insert names of individuals]* in connection with the performance of the Services and such persons' services shall be available when necessary and for so long as may be necessary to ensure the proper performance by the Design Certifier of the Services. Such persons shall have full authority to act on behalf of the Design Certifier for all purposes in connection with the Services.

2.7 The Design Certifier may by written notice to the Council and the Partner replace the staff identified in Clause 2.6 taking account the need for liaison, continuity, level of qualification and availability of personnel in respect of the Regeneration. Such replacement shall be subject to approval in writing by the Council and the Partner (not to be unreasonably withheld or delayed).

3 **Services**

3.1 The Design Certifier shall provide the Services from the date of this Deed (unless the Council and the Partner notify the Design Certifier in writing before that date that the performance of the Services should not commence on such date, in which case the performance of the Services shall commence on such other date as may be notified to the Design Certifier by the Council and the Partner).

3.2 The Design Certifier undertakes and warrants to the Council and the Partner that in carrying out and performing the Services the Design Certifier has exercised and will continue to exercise all such professional skill, care and diligence to be expected of a competent and fully qualified member of the relevant consultancy discipline experienced in carrying out services similar to the Services for projects of a similar nature, value, complexity and timescale to the Regeneration.

3.3 The Design Certifier acknowledges that each of the Council and the Partner is relying on the professional skill and judgement of the Design Certifier and will continue to rely on the Design Certifier in the performance of the Services and that it owes a duty of care to each of the Council and the Partner in relation thereto.

3.4 Where, in the performance of the Services, the Design Certifier seeks or is obliged to seek the approval or agreement of any of the Council and/or the Partner to any matter or issue, the giving or confirming of the same shall not in any way derogate from the Design Certifier's obligations under this Deed nor diminish any liability on his part for breach of such obligations and no enquiry, inspection, comment, consent, decision or instruction at any time made or given by or on behalf of the Council and/or the Partner shall operate to exclude or limit the obligations of the Design Certifier to exercise all the skill care and diligence required by this Deed or to comply with the obligations contained in this Deed.

3.5 The Design Certifier agrees that this Deed governs all Services provided by the Design Certifier whether before or after the date of this Deed.

3.6 In addition (and without limitation to the above) the Design Certifier shall:

3.6.1 proceed regularly and diligently with the Services and in so doing the Design Certifier will comply with all reasonable instructions and directions (provided the same do not prejudice the Design Certifier's undertaking under clause 3.8) given to it by the Council and/or the Partner pursuant to clause 2.2 on any matter connected with the Services save where the Design Certifier reasonably considers that any such instructions and directions vary or might

vary the Services whereupon the Design Certifier shall immediately notify the Council and the Partner;

- 3.6.2 co-operate fully with the other consultants and contractors employed or engaged in connection with the Regeneration and shall perform the Services in such manner and at such time so that no act, omission or default by the Design Certifier shall cause the Council and/or the Partner to be in breach of the Regeneration Agreement save where to do so would give rise to a breach by the Design Certifier of its obligations under this Deed; and
- 3.6.3 keep the Council and the Partner fully and properly informed on all aspects of the Services and provide them with such information and comments as they may from time to time reasonably require from the Design Certifier with regard to the Services promptly and in good time so as not to delay or disrupt the progress of the Regeneration.
- 3.7 The Design Certifier shall not have authority to act on behalf of the Council and/or the Partner in relation to any matter in connection with the Regeneration or otherwise and shall not hold itself out as having such authority to act on the behalf of the Council and/or the Partner. The Design Certifier shall not express an opinion on and shall not interfere with or give any advice or opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Deed. Without prejudice to the foregoing, the Design Certifier shall not make or purport to make any alteration or addition to or omission from the design of the Regeneration or issue any instruction or direction to any consultant or contractor employed or engaged in connection with the Regeneration.
- 3.8 The Design Certifier hereby undertakes to the Council and to the Partner to perform all the duties to be performed by the Design Certifier under this Deed independently, fairly and impartially as between the Council and the Partner. The Design Certifier shall have due and proper regard to any representations made by or on behalf of the Council and/or the Partner but not as to exclude the exercise of independent judgement on the part of the Design Certifier.
- 3.9 The duties and obligations of the Design Certifier arising under or in connection with this Deed are separate and independent duties and obligations owed to the Council and the Partner both jointly and severally and the Council and the Partner may accordingly enforce the provisions of this Deed and pursue their respective rights under this Deed in their own name, whether separately or with each other.
- 3.10 Any rights and remedies provided for in this Deed are cumulative and in addition to any further rights or remedies which might otherwise be available to the Council and/or the Partner.
- 3.11 The Council and the Partner covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Deed which would or might reasonably be expected to affect adversely the rights, remedies or entitlements of the other without the other's prior written consent (such consent not to be unreasonably withheld or delayed).
- 3.12 The Design Certifier warrants to each of the Council and the Partner jointly and severally that in the provision of the Services it will comply with all statutory requirements including (without limitation) the CDM Regulations and shall when attending the Regeneration Site comply with all the rules and any other reasonable requirements relating to the Regeneration Site given or made by the Partner or the Building Contractor.

3.13 The Design Certifier acknowledges that nothing contained in this Deed shall prejudice or affect its liability in tort to the Council and/or the Partner.

3.14 The Design Certifier shall carry out his Services in a timely manner in accordance with the Master Programme or as required by the Partner.

4 Fee

4.1 The Partner shall pay to the Design Certifier a fee of [] for the Services. The fee is exclusive of value added tax and inclusive of disbursements. The Design Certifier shall issue an invoice to the Partner on a [monthly] basis in accordance with Schedule 2. The date on which the invoice is received by the Partner shall constitute the due date. The final date for payment by the Partner shall be twenty (20) Working Days after receipt of the Design Certifier's invoice.

4.2 Not later than five (5) Working Days after the due date ascertained in accordance with Clause 4.1, the Partner shall give written notice to the Design Certifier stating the amount which the Partner proposes to pay and the basis on which the amount is calculated.

4.3 Where the Partner intends to withhold payment of any amount stated in the invoice, the Partner and the Council shall give written notice to the Design Certifier not later than five (5) Working Days before the final date for payment pursuant to Clause 4.1. The notice shall state the amount to be withheld and the ground or grounds for withholding the payment and if there is more than one ground, the notice shall identify the amount attributable to each ground.

4.4 If the Partner fails to pay the Design Certifier any sum payable under this Deed by the final date for payment, the Partner shall pay the Design Certifier simple interest on that sum from the final date for payment until the actual date of payment at four percent (4%) above the base rate of the Bank of England current at the date the payment became overdue.

4.5 For the avoidance of doubt the Council has no obligation to pay the Design Certifier for the Services. The liabilities under this Deed to the Design Certifier are not joint and several as between the Council and the Partner for the purposes of this Deed, but are the sole liability of the Partner to the exclusion of the Council. The Design Certifier hereby acknowledges and accepts that the Council has no responsibility or liability of any kind under this Deed to the Design Certifier howsoever arising, whether directly or indirectly and whether in contract, tort, under common-law, statute or otherwise.

5 Termination

5.1 The Council and the Partner may terminate this Deed at any time upon five (5) Working Days' by joint notice in writing to the Design Certifier.

5.2 If the Regeneration Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, this Deed may be terminated by written notice served jointly by the Council and the Partner.

5.3 The Design Certifier may terminate its appointment under this Deed if the Partner fails to make a payment of any sum due to the Design Certifier by the final date for payment in

accordance with clause 4.1 and no effective notice to withhold payment has been given in accordance with clause 4.3 and such sum is in excess of [twenty thousand] pounds (£20,000) (excluding VAT) and fails to remedy the same after receiving a thirty (30) Working Days' written notice from the Design Certifier to each of the Partner and the Council specifying the breach and requiring its remedy, provided that such sum is not the subject of any bona fide dispute or set-off.

- 5.4 The Council may elect to make payment to the Design Certifier of the monies owed by the Partner pursuant to clause 4 before the expiry of the period set out in clause 5.3 (or at any time thereafter prior to the termination of this Deed by the Design Certifier in accordance with clause 5.3) provided that the Council gives five (5) Working Days' notice to the Partner of its election to make such payment to the Design Certifier. Upon receipt of such payment the Design Certifier's right to terminate this Deed under clause 5.3 shall cease.
- 5.5 If the Council elects to make payment to the Design Certifier of the monies owed by the Partner pursuant to clause 5.4, any such sums shall be deemed to be Council Expenditure.
- 5.6 Termination of this Deed shall be without prejudice to any accrued rights and obligations under this Deed as at the date of termination (including the right of the Partner and the Council to recover damages from the Design Certifier).
- 5.7 The Council and the Partner may suspend the Services by joint written notice at any time. Upon suspension the Design Certifier will be paid the amount which shall have become payable under clause 4 for the Services already provided prior to the suspension. There shall be an appropriate adjustment to the [monthly] payment schedule set out in schedule 2 following an instruction to recommence the Services.
- 5.8 Termination of this Deed shall not affect the continuing rights and obligations of the Partner, the Council and the Design Certifier under Clauses 7 (*Confidentiality*), 8 (*Copyright*), 9 (*Professional Indemnity Insurance*), 17 (*Adjudication*), 24 (*Limitation on liability*) and this Clause or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

6 Consequences of termination

- 6.1 Upon any termination of the Design Certifier's appointment in accordance with clause 5 the Design Certifier shall:
 - 6.1.1 take immediate steps to bring to an end the Services in an orderly manner but with all reasonable speed and economy; and
 - 6.1.2 if requested within ten (10) Working Days deliver to the Council and the Partner copies of all reports, minutes of meetings and other documents (excluding internal memoranda, working papers and templates) prepared or in the course of preparation by the Design Certifier pursuant to this Deed, and
 - 6.1.3 in the event a replacement design certifier is appointed to complete the performance of the Services, co-operate fully with such replacement for the orderly transfer or continuation of the Services, to the extent required by and at the reasonable cost of the Partner, save where the termination has arisen as a consequence of any default by the Design Certifier whereupon the Design Certifier shall bear its own costs.

6.2 Subject always to clause 7, the Design Certifier shall retain a copy of the documents referred to in clause 6.1 for a period of twelve (12) years from the date of termination of the Design Certifier's appointment under this Deed. Upon the expiry of this period, if requested, all documents shall be delivered to the Council and the Partner or as otherwise directed by the Council and the Partner.

6.3 If the Design Certifier's appointment under this Deed is terminated, the Partner shall be liable (subject to any withholdings, deductions or set-off which the Partner is entitled to make) to pay to the Design Certifier that part of the fee set out in schedule 2 which has accrued and is due prior to the date of such termination less the amount of any payments previously made by the Partner to the Design Certifier under this Deed.

6.4 Save in so far as the same arises from any accrued right arising under this Deed including the payment of any fees up to and including the date of termination of the Design Certifier's appointment under this Deed, the Design Certifier shall have no right to receive any compensation or remuneration by reason of the termination of the Design Certifier's appointment under this Deed.

7 **Confidentiality**

7.1 Save as required by law or as may be necessary for the proper performance of its duties the Design Certifier shall not during its appointment as Design Certifier under this Deed or at any time after its expiry or termination disclose to any third party or make use of any information relating to the Regeneration whether contained in the Regeneration Agreement or otherwise unless with the prior written consent of both the Council and the Partner.

7.2 The Design Certifier shall comply with its obligations under the Data Protection Act 1998 and other such applicable legal requirements in respect of such data.

8 **Copyright**

8.1 The copyright in all reports and other documents produced by the Design Certifier in connection with the Services (the **Proprietary Material**) shall remain vested in the Design Certifier and the Design Certifier grants to the Partner and the Council and their respective nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such Proprietary Material and to reproduce the information contained in them for any purpose related to the Regeneration including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Regeneration. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.

8.2 The Design Certifier shall not be liable for use by any person of the Proprietary Material for any purpose other than that for which the same were prepared by or on behalf of the Design Certifier.

8.3 The Consultant acknowledges that:

- a Where it is the author (as referred to in the Copyright, Designs and Patents Act 1988) of the Proprietary Material and waives any moral rights which it might otherwise be deemed to possess under Chapter IV of that Act in respect of the Proprietary Material and of the Development; and

- b Where it is not the author (as referred to in the Copyright, Designs and Patents Act 1988) of the Proprietary Material it warrants that the author of the Proprietary Material has not asserted its moral rights in any way and has expressly waived any moral rights it may possess under Chapter IV of that Act in respect of the Proprietary Material.

8.4 The Council and/or the Partner shall on written request and upon paying a reasonable copying charge be entitled to be supplied by the Design Certifier with copies of the items referred to in clause 8.1.

8.5 Where a claim or proceedings is made or brought against the Council and/or the Partner which arises out of infringement of any copyright, unless such infringement has arisen out of the use of the Documents by or on behalf of the Council and/or the Partner (as appropriate) otherwise than in accordance with the terms of this Deed, the Design Certifier shall indemnify the Council and/or the Partner (as appropriate) at all times from and against all such claims and proceedings.

9 Professional Indemnity Insurance

9.1 Without prejudice to its obligations under this Deed, or otherwise at law, the Design Certifier shall maintain at all times professional indemnity insurance covering all liability under this Deed upon customary and usual terms and conditions prevailing for the time being in the insurance market, with a limit of indemnity of not less than five million pounds (£5,000,000) in the aggregate for each Regeneration Phase in respect of any neglect, error or omission on the Design Certifier's part in the performance of its obligations under this Deed for the period commencing on the date of this Deed and expiring 12 years after:

9.1.1 the date of certification of the final Regeneration Phase; or

9.1.2 the termination of this Deed;

whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates to service providers carrying out services of a similar nature to the Services and who operate businesses of a similar nature to that of the Design Certifier.

9.2 The Design Certifier shall maintain such insurance with reputable insurers lawfully carrying on business in the United Kingdom.

9.3 Any increased or additional premium required by insurers by reason of the Design Certifier's own claims record or other acts, omissions, matters or things particular to the Design Certifier shall be deemed to be within commercially reasonable rates.

9.4 The Design Certifier shall as soon as reasonably practicable inform the Partner and the Council if such insurance ceases to be available at commercially reasonable rates in order that the Design Certifier and the Partner and the Council can discuss means of best protecting the respective positions of the Partner and the Council and the Design Certifier in respect of the Regeneration in the absence of such insurance.

9.5 The Design Certifier shall fully co-operate with any measures reasonably required by the Partner and the Council including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially

reasonable rates if the Partner and the Council undertake in writing to reimburse the Design Certifier in respect of the net cost of such insurance to the Design Certifier above commercially reasonable rates.

- 9.6 The Design Certifier shall, prior to commencing the provision of the Services and as soon as reasonably practicable following renewal dates, produce for inspection by the Partner and the Council documentary evidence that such insurance is being properly maintained.
- 9.7 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Deed for any reason whatsoever, including (without limitation) breach by the Partner and/or the Council.

10 Notices

- 10.1 All notices required in connection with this Deed shall be in writing and sent by hand, by special delivery, by first class pre-paid post or by facsimile transmission to the relevant address or facsimile number set out below or to such other address or facsimile number as a party to this Deed may notify to the other parties to this Deed in writing:

[]

- 10.2 Any notice given pursuant to clause 10.1 shall be deemed to be served, if delivered personally, at the time of delivery or, if sent by post two Working Days after posting, or, if sent by facsimile, the Working Day following its proper transmission evidenced by a confirmatory transmission sheet not indicating any transmission error and always provided that a copy of the notice is posted by special delivery post to the receiving party on the day of its transmission.

11 Assignment

- 11.1 The Design Certifier shall not assign or transfer any of its rights or obligations under this Deed or sub-contract the whole or any part of the Services.
- 11.2 The Council and/or the Partner may assign their respective interests in this Deed and/or any rights arising under this Deed (whether accrued or not).

12 Enforcement

- 12.1 The duties and obligations of the Design Certifier arising under or in connection with this Deed are owed to the Partner and the Council both jointly and severally and the Partner and the Council may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.
- 12.2 The Partner and the Council covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Deed which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

13 Waiver

The failure of any party at any one time to enforce any provision of this Deed shall in no way affect its right thereafter to require complete performance by any other party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

14 **Severability**

In the event that any term, condition or provision contained in this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Deed and the rest of this Deed shall stand, without affecting the remaining clauses.

15 **Counterparts**

This Deed may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

16 **Variation**

A variation of this Deed is valid only if it is in writing and signed by or on behalf of each party.

17 **Adjudication**

17.1 If a dispute or difference arises between any of the Parties under this Deed a party may give notice of its intention to refer such dispute or difference to adjudication at any time and the President for the time being of the Chartered Institute of Arbitrators shall appoint an Adjudicator to consider the dispute within five (5) Working Days of any application for such appointment by either party. The party referring such dispute shall be called the **Referrer** and the party responding shall be called the **Respondent**.

17.2 Upon the appointment of the Adjudicator the disputing parties shall comply with all the directions which he may issue for the purposes of fairly and expeditiously considering the facts and issues in the dispute and so that the Adjudicator shall reach a decision within 20 Working Days of the date of referral to him under clause 17.1 or such longer period as is agreed by the disputing parties after the dispute has been referred and the Adjudicator may extend the period of 20 Working Days by up to 10 Working Days with the Referrer's consent.

17.3 The Adjudicator shall:

17.3.1 act fairly and impartially and shall take the initiative in ascertaining the facts and the law and shall reach his decision in accordance with the applicable law in relation to this Deed and shall publish his decision simultaneously in writing and with reasons to the disputing parties, and

17.3.2 avoid incurring unnecessary expense.

17.4 In determining any dispute referred to him for a decision the Adjudicator:

17.4.1 shall consider any written representations, statements and expert's reports submitted to him by the disputing parties (which shall be exchanged between the parties when the same are supplied to the Adjudicator),

- 17.4.2 shall afford the disputing parties the opportunity to address him in a meeting or meetings at which the disputing parties must be present,
- 17.4.3 shall permit the disputing parties to be represented by such legal or other representatives as they shall see fit,
- 17.4.4 shall have the power to require the disputing parties to produce to him and to the other disputing party copies of any documents they are able to produce which may assist in the reference (save any which would be privileged from production in Court proceedings) between the disputing parties relating to the dispute,
- 17.4.5 shall be entitled to instruct an expert and to take counsel's opinion as to any matter within their field of expertise raised by the reference, but shall not be entitled to delegate any decision to such expert or counsel, and
- 17.4.6 subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments.
- 17.5 The Adjudicator's decision is binding upon the disputing parties until finally determined by legal proceedings or by agreement. If any disputing party is dissatisfied with or otherwise wishes to challenge the Adjudicator's decision, or the disputing parties agree, then, within twenty eight (28) Working Days following receipt of the Adjudicator's decision, any disputing party may notify the others of its intention to commence legal proceedings.
- 17.6 The disputing parties hereby agree that the Adjudicator (including any employee or agent of the Adjudicator) appointed in accordance with this clause 17 shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith.
- 17.7 If a disputing party does not comply with the decision of the Adjudicator the other disputing party shall be entitled to take proceedings in the Courts to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 11.5.
- 17.8 Subject to the provisions of clauses 17.2, 17.3, 17.4 and 17.10, in deciding any dispute referred to him, the Adjudicator shall determine and take into account any matter (a **Cross-claim**) raised by the Respondent to the notice to refer by way of defence or set-off or counter claim, provided such Cross-claim arises under this Deed.
- 17.9 Clauses 17.2 to 17.7 (inclusive) shall apply to any Cross-claim as they apply to any dispute referred to the Adjudicator pursuant to clause 17.1.
- 17.10 Clauses 17.8 and 17.9 shall not apply to any Cross-claim if such Cross-claim is being decided or has been decided by an adjudicator other than the Adjudicator appointed pursuant to clauses 17.1 and 17.2 to determine the relevant dispute or difference.
- 17.11 The Adjudicator's reasonable fees and expenses shall be borne as the Adjudicator shall specify or, in default, equally by the Referrer and the Respondent. The Referrer and the Respondent shall each bear its own costs arising out of the reference, including legal costs and expenses of any witnesses.
- 17.12 The parties to the adjudication shall continue to comply with, observe and perform all their obligations under this Deed regardless of the nature of the dispute and notwithstanding the

referral of the dispute for resolution under this Clause 17 and shall give effect immediately to every decision of the Adjudicator or the Courts delivered under this clause 17.

18 Governing Law and Jurisdiction

- 18.1 This Deed and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with the laws of England, and the parties hereby submit to the non-exclusive jurisdiction of the courts of England.
- 18.2 No action or proceedings may be commenced against the Design Certifier for any breach of this Deed after the expiry of 12 years following the date of completion of the Services or the termination of this Deed, whichever is the earlier.

19 Third Party Rights

Save as expressly set out herein, no provision of this Deed is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party against any party to this Deed.

20 No partnership

Nothing in this Deed shall be construed as creating a partnership between the Council and the Partner and neither the Council or the Partner shall conduct itself in such a way as to create an impression that such a partnership exists.

21 Whole agreement

- 21.1 This Deed supersedes any previous agreement or arrangement between the parties in respect of the Services (whether oral or written) and represents the entire understanding between the parties in relation to the Services.
- 21.2 Nothing in this Deed is intended to, or shall operate so as to, exclude or limit any liability for fraud or fraudulent misrepresentation.
- 21.3 The rights set out in clause 6 are the sole and exclusive rights of the parties to terminate this Deed.

22 Severability

In the event that any term, condition or provision contained in this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Deed and the remainder of this Deed shall remain valid and enforceable.

23 Force majeure

None of the parties to this Deed shall be liable to the other for any failure to comply with their respective obligations during the occurrence of a Force Majeure Event save for the payment of any sums due and payable to the Design Certifier up to the occurrence of the Force Majeure Event.

24 Limitation on liability

The Design Certifier's total liability under or in connection with this Deed (whether in contract, tort or otherwise) shall be limited to £5,000,000 (five million pounds) in the aggregate for each Regeneration Phase.

Schedule 1

Scope of Services

- 1 The Design Certifier shall perform all the functions and obligations attributed to the Design Certifier in the relevant clauses of the Regeneration Agreement and this Deed.
- 2 The Design Certifier shall familiarise itself with the Design Guidelines and the Regeneration Agreement together with any variations to the same as may be issued from time to time.
- 3 The Design Certifier shall attend the regular design team meetings and report at such meetings any areas of the design that do not comply with the Design Guidelines and offer advice where possible as to how to achieve the standard required by the Design Guidelines.
- 4 Prior to the commencement of each Regeneration Phase the Design Certifier will certify by issue of Design Certificates to the Partner that the Homes, Community Facilities and any other buildings to be constructed in that Regeneration Phase comply with the Design Guidelines.
- 5 The Design Certifier will identify and schedule any non-compliance with the Design Guidelines and will promptly inform the Partner and the Council of all matters of concern which could prevent or delay the issue of the Design Certificates.

Schedule 2
Schedule of Fees

EXECUTED AS A DEED by the parties on the date which first appears in this Deed.